

§ 402.14 Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1)A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2)A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c)Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1)A description of the action to be considered;

(2)A description of the specific area that may be affected by the action;

(3)A description of any listed species or critical habitat that may be affected by the action;

(4)A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5)Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6)Any other relevant available information on the action, the affected listed species, or critical habitat. Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d)Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e)Duration and extension of formal consultation. Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the

consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

- (1) The reasons why a longer period is required,
- (2) The information that is required to complete the consultation, and
- (3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional data. When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to §402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

- (1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.
- (2) Evaluate the current status of the listed species or critical habitat.
- (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
- (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.
- (5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for

issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) Biological opinions. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) Incidental take. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species (A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

- (v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.
- (2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.
- (3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with *50 CFR 13.45* and *18.27* for FWS and *50 CFR 216.105* and *222.301(h)* for NMFS.
- (4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinstate consultation immediately.
- (5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.
- (6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.
- (j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.
- (k) Incremental steps. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:
- (1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);
 - (2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;
 - (3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;
 - (4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and
 - (5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.
- (l) Termination of consultation.**
- (1) Formal consultation is terminated with the issuance of the biological opinion.
 - (2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

§ 402.40 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

(a) Alternative consultation agreement is the agreement described in § 402.45.

(b) Effects determination is a written determination by the U.S. Environmental Protection Agency (EPA) addressing the effects of a FIFRA action on listed species or critical habitat. The contents of an effects determination will depend on the nature of the action. An effects determination submitted under §402.46 or § 402.47 shall contain the information described in § 402.14(c)(1)-(6) and a summary of the information on which the determination is based, detailing how the FIFRA action affects the listed species or critical habitat. EPA may consider the following additional sections for inclusion in an effects determination:

(1) A conclusion whether or not the FIFRA action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat and a description of any reasonable and prudent alternatives that may be available;

(2) A description of the impact of any anticipated incidental taking of such listed species resulting from the FIFRA action, reasonable and prudent measures considered necessary or appropriate to minimize such impact, and terms and conditions necessary to implement such measures; and

(3) A summary of any information or recommendations from an applicant. An effects determination shall be based on the best scientific and commercial data available.

(c) FIFRA action is an action by EPA to approve, permit or authorize the sale, distribution or use of a pesticide under sections 136-136y of the Federal Insecticide, Fungicide and Rodenticide Act, 7 *U.S.C. 136* et seq. (FIFRA). In any consultation under this subpart, EPA shall determine the nature and scope of a FIFRA action.

(d) Listed species is a species listed as endangered or threatened under section 4 of the Act.

(e) Partial biological opinion is the document provided under § 402.47(a), pending the conclusion of consultation under § 402.47(b), stating the opinion of the Service as to whether or not a FIFRA action is likely to jeopardize the continued existence of one or more listed species or result in the destruction or adverse modification of one or more critical habitats, and describing the impact of any anticipated incidental taking of such listed species resulting from the FIFRA action, reasonable and prudent measures considered necessary or appropriate to minimize such impact, and terms and conditions necessary to implement such measures.

(f) Service Director refers to the Director of the U.S. Fish and Wildlife Service or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

(g) Service Representative is the person or persons designated to participate in advance coordination as provided in this subpart.

§ 402.42 Scope and applicability.

(a) Available consultation procedures. This subpart describes consultation procedures available to EPA to satisfy the obligations of section 7(a)(2) of the Act in addition to those in subpart B of this part for FIFRA actions authorized, funded, or carried out by EPA in which EPA has

discretionary Federal involvement or control. EPA retains discretion to initiate early, informal, or formal consultation as described in §§ 402.11, 402.13, and 402.14 for any FIFRA action. The procedures in this subpart may be employed for FIFRA actions as follows:

- (1) Interagency exchanges of information under § 402.43 and advance coordination under § 402.44 are available for any FIFRA action.
 - (2) Alternative consultation under § 402.45 is available for a listed species or critical habitat if EPA determines the FIFRA action is not likely to adversely affect the listed species or critical habitat.
 - (3) Optional formal consultation under § 402.46 is available for any FIFRA action with respect to any listed species or critical habitat.
 - (4) The special procedures in § 402.47 are available for consultations on FIFRA actions that will be unusually complex due to factors such as the geographic area or number of species that may be affected by the action.
 - (5) EPA shall engage in consultation as to all listed species and critical habitat that may be affected by a FIFRA action, and may in its discretion employ more than one of the available consultation procedures for a FIFRA action that may affect more than one listed species or critical habitat.
 - (6) EPA shall engage in consultation on actions involving requests for emergency exemptions under section 18 of FIFRA that may affect listed species or critical habitat, and may choose to do so under § 402.05 or other provisions of this subpart or subpart B of this part. Any required formal consultation shall be initiated as soon as practicable after the emergency is under control. For the purposes of § 402.05(b) the definition of formal consultation in § 402.02 includes the procedures in § 402.46.
 - (7) EPA must prepare a biological assessment for a FIFRA action to the extent required by § 402.12.
 - (8) EPA must comply with § 402.15 for all FIFRA actions.
 - (9) After a consultation under this subpart has been concluded, EPA shall reinstitute consultation as required by § 402.16 as soon as practicable after a circumstance requiring reinstitution occurs, and may employ the procedures in this subpart or subpart B of this part in any reinstituted consultation.
- (b) Exchanges of scientific information. As part of any of the additional consultation procedures provided in this subpart, EPA and the Services shall establish mutually-agreeable procedures for regular and timely exchanges of scientific information to achieve accurate and informed decision-making under this subpart and to ensure that the FIFRA process considers the best scientific and commercial data available on listed species and critical habitat in a manner consistent with the requirements of FIFRA and ESA.

§ 402.43 Interagency exchanges of information.

EPA may convey to the Service a written request for a list of any listed species or critical habitat that may be present in any area that may be affected by a FIFRA action. Within 30 days of receipt of such a request the Service shall advise EPA in writing whether, based on the best scientific and commercial data available, any listed species or critical habitat may be present in any such area. EPA may thereafter request the Service to provide available information (or references thereto) describing the applicable environmental baseline for each species or habitat that EPA determines may be affected by a FIFRA action, and the Service shall provide such information within 30 days of the request.

§ 402.44 Advance coordination for FIFRA actions.

(a) Advance coordination. EPA may request the Service to designate a Service Representative to work with EPA in the development of an effects determination for one or more listed species or critical habitat. EPA shall make such a request in writing and shall provide sufficient detail as to a FIFRA action planned for consultation to enable the Service to designate a representative with appropriate training and experience who shall normally be available to complete advance coordination with EPA within 60 days of the date of designation. Within 14 days of receiving such a request, the Service shall advise EPA of the designated Service Representative.

(b) Participation of Service Representative in preparation of effects determination. The Service Representative designated under paragraph (a) of this section shall participate with EPA staff in the preparation of the effects determination identified under paragraph (a) of this section. EPA shall use its best efforts to include the designated Service Representative in all relevant discussions on the effects determination, to provide the designated Service Representative with access to all documentation used to prepare the effects determination, and to provide the designated Service Representative office and staff support sufficient to allow the Service Representative to participate meaningfully in the preparation of the effects determination. EPA shall consider all information timely identified by the designated Service Representative during the preparation of the effects determination.

§ 402.45 Alternative consultation on FIFRA actions that are not likely to adversely affect listed species or critical habitat.

(a) Consultation obligations for FIFRA actions that are not likely to adversely affect listed species or critical habitat when alternative consultation agreement is in effect. If EPA and the Service have entered into an alternative consultation agreement as provided below, EPA may make a determination that a FIFRA action is not likely to adversely affect a listed species or critical habitat without informal consultation or written concurrence from the Director, and upon making such a determination for a listed species or critical habitat, EPA need not initiate any additional consultation on that FIFRA action as to that listed species or critical habitat. As part of any subsequent request for formal consultation on that FIFRA action under this subpart or subpart B of this part, EPA shall include a list of all listed species and critical habitat for which EPA has concluded consultation under this section.

(b) Procedures for adopting and implementing an alternative consultation agreement. EPA and the Service may enter into an alternative consultation agreement using the following procedures:

(1) Initiation. EPA submits a written notification to the Service Director of its intent to enter into an alternative consultation agreement.

(2) Required contents of the alternative consultation agreement. The alternative consultation agreement will, at a minimum, include the following components:

(i) Adequacy of EPA Determinations under the ESA. The alternative consultation agreement shall describe actions that EPA and the Service have taken to ensure that EPA's determinations regarding the effects of its actions on listed species or critical habitat are consistent with the ESA and applicable implementing regulations.

(ii) Training. The alternative consultation agreement shall describe actions that EPA and the Service intend to take to ensure that EPA and Service personnel are adequately trained to carry out their respective roles under the alternative

consultation agreement. The alternative consultation agreement shall provide that all effects determinations made by EPA under this subpart have been reviewed and concurred on by an EPA staff member who holds a current certification as having received appropriate training under the alternative consultation agreement.

(iii) Incorporation of new information. The alternative consultation agreement shall describe processes that EPA and the Service intend to use to ensure that new information relevant to EPA's effects determinations is timely and appropriately considered.

(iv) Incorporation of scientific advances. The alternative consultation agreement shall describe processes that EPA and the Service intend to use to ensure that the ecological risk assessment methodologies supporting EPA's effects determinations incorporate relevant scientific advances.

(v) Oversight. The alternative consultation agreement shall describe the program and associated record keeping procedures that the Service and EPA intend to use to evaluate EPA's processes for making effects determinations consistent with these regulations and the alternative consultation agreement. The alternative consultation agreement shall provide that the Service's oversight will be based on periodic evaluation of EPA's program for making effects determinations under this subpart. Periodic program evaluation will occur at the end of the first year following signature of the alternative consultation agreement and should normally occur at least every five years thereafter.

(vi) Records. The alternative consultation agreement shall include a provision for EPA to maintain a list of FIFRA actions for which EPA has made determinations under this section and to provide the list to the Services on request. EPA will also maintain the necessary records to allow the Service to complete program evaluations.

(vii) Review of Alternative Consultation Agreement. The alternative consultation agreement shall include provisions for regular review and, as appropriate, modification of the agreement by EPA and the Service, and for departure from its terms in a particular case to the extent deemed necessary by both EPA and the Service.

(3) Training. After EPA and the Service enter into the alternative consultation agreement, EPA and the Service will implement the training program outlined in the alternative consultation agreement to the mutual satisfaction of EPA and the Service.

(4) Public availability. The alternative consultation agreement and any related oversight or monitoring reports shall be made available to the public to the extent provided by law.

(c) Oversight of alternative consultation agreement implementation. Through the program evaluations set forth in the alternative consultation agreement, the Service will determine whether the implementation of this section by EPA is consistent with the best scientific and commercial information available, the ESA, and applicable implementing regulations. The Service Director may use the results of the program evaluations described in the alternative consultation agreement to recommend changes to EPA's implementation of the alternative consultation agreement. The Service Director retains discretion to terminate or suspend the alternative consultation agreement if, in using the procedures in this subpart, EPA fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the alternative consultation agreement. Termination, suspension, or modification of an alternative consultation

agreement does not affect the validity of any NLAA determinations made previously under the authority of this subpart.

§ 402.46 Optional formal consultation procedure for FIFRA actions.

(a)Initiation of consultation. EPA may initiate consultation on a FIFRA action under this section by delivering to the Service a written request for consultation. The written request shall be accompanied by an effects determination as defined in § 402.40(b) and a list or summary of all references and data relied upon in the determination. All such references and data shall be made available to the Service on request and shall constitute part of the Service's administrative record for the consultation. The time for conclusion of the consultation under section 7(b)(1) of the Act is calculated from the date the Service receives the written request from EPA. Any subsequent interchanges regarding EPA's submission, including interchanges about the completeness of the effects determination, shall occur during consultation and do not extend the time for conclusion of the consultation unless EPA withdraws the request for consultation.

(b)Additional information determination. For an effects determination prepared without advance coordination under § 402.44, the Service may determine that additional available information would provide a better information base for the effects determination, in which case the Service Director shall notify the EPA Administrator within 45 days of the date the Service receives the effects determination. The notification shall describe such additional information in detail, and shall identify a means for obtaining that information within the time period available for consultation. EPA shall provide a copy of the Service Director's notification to any applicant. EPA may thereafter revise its effects determination, and may resubmit the revised effects determination to the Service. If EPA advises the Service it will not resubmit a revised effects determination to the Service, its initiation of consultation on the effects determination is deemed withdrawn.

(c)Service responsibilities. (1) Within the later of 90 days of the date the Service receives EPA's written request for consultation or 45 days of the date the Service receives an effects determination resubmitted under paragraph (b) of this section, and consistent with section 7(b)(1) of the Act, the Service shall take one of the following actions:

(i)If the Service finds that the effects determination contains the information required by § 402.40(b) and satisfies the requirements of section 7(b)(4) of the Act, and the Service concludes that the FIFRA action that is the subject of the consultation complies with section 7(a)(2) of the Act, the Service will issue a written statement adopting the effects determination; or

(ii)The Service will provide EPA a draft of a written statement modifying the effects determination, which shall meet the requirements of § 402.14(i), and as modified adopting the effects determination, and shall provide a detailed explanation of the scientific and commercial data and rationale supporting any modification it makes; or

(iii)The Service will provide EPA a draft of a biological opinion finding that the FIFRA action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, and describing any reasonable and prudent alternatives if available.

(2) If the Service acts under paragraphs (c)(1)(ii) or (c)(1)(iii) of this section, EPA shall, on request from an applicant, provide the applicant a copy of the draft written statement or draft biological opinion received from the Service. The Service shall at the request of

EPA or an applicant discuss with EPA and the applicant the Service's review and evaluation under this section, and the basis for its findings. EPA and any applicant may submit written comments to the Service within 30 days after EPA receives the draft written statement or opinion from the Service unless the Service, EPA and any applicant agree to an extended deadline consistent with section 7(b)(1) of the Act.

(3) The Service will issue a final written statement or final biological opinion within 45 days after EPA receives the draft statement or opinion from the Service unless the deadline is extended under section 7(b)(1) of the Act.

(d)Opinion of the Secretary. The written statement or opinion by the Service under paragraphs (c)(1) or (c)(3) of this section shall constitute the opinion of the Secretary and the incidental take statement, reasonable and prudent measures, and terms and conditions under section 7(b) of the Act.

(e)Delegation of Authority for Service decisions. Any written statement modifying an effects determination or any biological opinion issued under this section shall be signed by the Service Director and such authority may not be delegated below the level of Assistant Director for Endangered Species (FWS) or Director of Office of Protected Resources (NOAA Fisheries).

§ 402.47 Special consultation procedures for complex FIFRA actions.

(a)Successive effects determinations. If EPA determines after conferring with the Service that consultation on a FIFRA action will be unusually complex due to factors such as the geographic area or number of species that may be affected by the action, EPA may address the effects of the action through successive effects determinations under this subpart addressing groupings or categories of species or habitats as established by EPA. EPA may initiate consultation based upon each such effects determination using the procedure in § 402.46(a), and the provisions of § 402.46(b) and (c) shall apply to any such consultation. When consultation is conducted under this section, the written statement or opinion provided by the Service under § 402.46(c) constitutes a partial biological opinion as to the species or habitats that are the subject of the consultation. While not constituting completion of consultation under section 7(a)(2), EPA retains authority to use such a partial biological opinion along with other available information in making a finding under section 7(d) of the Act.

(b)Opinion of the Secretary. After conclusion of all consultation on the FIFRA action, the partial biological opinions issued under paragraph (a) of this section shall then collectively constitute the opinion of the Secretary and the incidental take statement, reasonable and prudent measures, and terms and conditions under section 7(b) of the Act except to the extent a partial biological opinion is modified by the Service in accordance with the procedures in § 402.46(c). The Service shall so advise EPA in writing upon issuance of the last partial biological opinion for the consultation.